INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Reasons for granting the writ	9
Conclusion	21

Cases:

Beaver v. Morrison-Knudsen Co., 65 Idaho 275, 41 P. 2nd 905	16
Bethlehem Steel Co. v. Parker, 162 F. 2d 294	20
Bloem's Case, 322 Mass. 434, 111 N. E. 2d	16
Fear-Campbell Co. v. Yearion, 93 Ind. App. 332, 164 N. E. 282	17
Franke v. Carpenter, 192 Iowa 1398, 186 N. W. 847	16
General Cable Corp. v. Lewis, 124 N. J. L. 228, 11 A. 2d 61	19
Gibbons v. United Electric Rys. Co., 48 R. I. 358, 138 A. 175	16
Hoage v. Employers' Liability Assurance Corp., 64 F. 2d 715	20
Hoage v. Royal Indemnity Co., 90 F. 2d 387	20
Hotel Claridge v. Blank, 169 Tenn. 575, 89 S. W. 2d 758	16
Hughes, Matter of v. St. Patricks Cathedral, 245 N. Y. 201, 156 N. E. 668	16
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149	17
McTaggart v. Lowe, 69 F. Supp. 101	20
Meehan v. Crowder, 158 Fla. 361, 28 So. 2d 426	16
Merrill v. American Stevedores, 15 N. J. Misc. 710, 195 A. 382	16
Oldman Boiler Works v. McMonigal, 56 F. Supp. 307	16
Pillsbury v. United Engineering Co., 342 U. S. 197	19
Roberts v. Black Mountain Corp., 280 Ky. 256, 132 S. W. 2d 941	15
Simmons' Case, 117 Me. 175, 103 A. 68	16
Smith v. Samuel T. Gately Marble & Granite Works, 157 So. 302 (C. A. La.)	16
Southern Pacific Co. v. Jensen, 244 U. S. 205	17
Taylor v. Missouri P. R. Co., 146 Kan. 668, 72 P. 2d 62	17
Uditsky v. Krakowiz, 133 Pa. Supr. 166, 2 A. 2d 835	16
Van Treck v. Travelers Insurance Co., 157 Ga. 204, 121 S. E. 215	15
Washington v. Dawson & Co., 264 U. S. 219	17
Whitmyre, Matter of v. Inter B. M. Corp., 307 N. Y. 28, 195 N. E. 539	15

246504—53——1

Statutes: Page

13 Florida S. A. § 440.15 16

Longshoreman's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. 901 et seq. 1, 4

Section 7 (c) 17

Section 12 3

Section 13 (a) 3, 10

Section 13 (b) 3

Section 13 (c) 3

Section 13 (d) 2, 4, 9, 10, 11, 17, 18

Section 21 (b) 4

33 U. S. C. 921a 1

Miscellaneous:

Hazards, Injury and Death under Workmen's Compensation Laws (1944):

p. 307 13

pp. 325-6 14

H. Rept. 1192, 69th Cong. 1st Sess. 17

S. Rept. 972, 69th Cong. 1st Sess. p. 16 17

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 661

HUGH A. VORIS, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, FOR THE EIGHTH COMPENSATION DISTRICT, PETITIONER

v.

CHARLES EIKEL AND B. D. HARRIS, D/B/A SOUTHERN STEVEDORING & CONTRACTING COMPANY, AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of Hugh A. Voris, Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act for the Eighth Compensation District, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 17, 1962.[1]

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[1] The Solicitor General appears for petitioner pursuant to the requirements of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901 *et seq.*), as amended by the Act of May 4, 1928, 45 Stat. 490, 33 U. S. C. 921c.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas (R. 237-238) is reported at 101 F. Supp. 963. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 241-249) is reported at 200 F. 2d 724.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1952 (R. 249). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

An illiterate longshoreman was injured in the course of his employment. Although no written notice was afforded the employer within thirty days, the foreman in charge of the longshoremen was immediately informed of the injury. The questions presented are:

1. Whether the foreman's knowledge of the injury constituted knowledge on the part of "the employer (or his agent in charge of the business in the place where the injury occurred)" within the meaning of Section 12 (d) (1) of the Longshoremen's and Harbor Workers' Compensation Act, providing for circumstances in which failure to give written notice is not a bar to a claim.

2. Whether the deputy commissioner abused his discretion in excusing, pursuant to Section 12 (d) (2) of the Act, the submission of written notice of injury on the ground that "for some

satisfactory reason such notice could not be given."

STATUTE INVOLVED

Section 12 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1431, 33 U. S. C. 912, provides as follows:

(a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge

of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (2) if a claim for compensation in respect of such injury or death is made within one year after the date of the injury or death, or (3) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given, unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

STATEMENT

This action was brought to enjoin the enforcement of an award of compensation entered by petitioner Hugh A. Voris, Deputy Commissioner, Bureau of Employees Compensation, for the Eighth Compensation District, pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*[*] The pertinent facts may be summarized as follows.

On December 19, 1949, one Earl Porter was employed by respondents Charles Rikel and B. D.

[*] Section 21 (b) of the Act (33 U. S. C. 921 (b)) provides that an injunction proceeding in a district court shall be the manner of obtaining judicial review of compensation orders.

Harris, doing business as Southern Surveying and Contracting Company, as a longshoreman in connection with the unloading of the SS South [illegible] Texas City, Texas (R. 65-67, 178). While [illegible] in the performance of his duties, Porter was injured when he fell over [illegible] in an effort to avoid the consequences of a fight that had broken out in the hold (R. 65-67). On August 24, 1950, he filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. [illegible]) against respondent employer and its insurance carrier, hereinafter called employers. [illegible] filed an answer controverting a specific [illegible] that notice of injury was provided within the period stipulated by Section 12 (a) of the Act (R. 7).

On September 19, 1950 and November 10, 1950, formal hearings were conducted by the deputy commissioner (R. 62, 125). The evidence adduced at these hearings showed, in part, that while claimant, who was illiterate to the extent that he could barely write his own name (R. 88), did not give written notice to his employer, he reported his injury immediately after the accident to two supervisory employees, Leslie Lovely and Homer Wisby (R. 126, 186). Lovely was the immediate foreman of the gang of longshoremen to which claimant had been assigned (R. 180). Wisby was performing the duties of the so-called "walking foreman" (R. 127). In that capacity he had charge

and that said foreman testified that he had reported the injury to a timekeeper of the employer; that it is shown by the testimony of several fellow-workers that claimant was complaining of injury at the time said injury occurred and that his injury was generally known to these fellow-employees following a hurried exit from the ship due to a fire; that the timekeeper has testified that he immediately vacated the scene of the accident, and could easily have inquired as to injuries among the gang foremen but disclaims knowledge of the injury at the time; that claimant's verbal report of injury to his immediate foreman constitutes the usual method of reporting such injuries, and that it is clearly due to the negligence of agents of the employer that said injury was not reported and claimant furnished with medical treatment at the time the injury occurred.

On April 3, 1951, the employer filed a supplemental complaint alleging that there was no evidence to sustain the findings as to the knowledge of the employer's agent, the absence of prejudice, and the existence of a satisfactory reason for failing to give written notice (R. 35).

On September 17, 1951, the District Court granted the injunction (R. 233–234). Conceding that the evidence supported the deputy commissioner's finding that the immediate foreman, the walking foreman, and the timekeeper had been

given notice of the injury, the court held that this did not constitute knowledge on the part of the employer or "his agent in charge of the business in the place where the injury occurred", within the meaning of Section 12 (d) (1) of the Longshoremen's Act (R. 229-230). In the court's view, the individual responsible for the stevedoring gear was the "agent in charge" (R. 229).* The court further held that the above findings of the deputy commissioner did not support his determination under Section 12 (d) (2) that "for some satisfactory reason [written] notice could not be given" (R. 230-231).

On December 17, 1952, the Court of Appeals, in a split decision, affirmed (R. 249). The majority adopted in large measure the position of the District Court (R. 241-245). Judge Rives dissented on the alternative grounds (a) that the knowledge of the foreman constituted knowledge on the part of the employer for the purposes of Section 12 (d) (1) of the Act and (b) that the deputy commissioner did not abuse his discretion in excusing, pursuant to Section 12 (d) (2) of the Act, the failure to provide written notice (R. 245-249).

REASONS FOR GRANTING THE WRIT

Section 12 (d) of the Longshoremen's and Harbor Workers' Act (33 U. S. C. 912 (d))

*This gearman was aboard the vessel at the time of the injury but was not at the scene of the unloading operations (R. 190).

(supra, p. 4) provides that the failure to give written notice of injury to the employer and the deputy commissioner within 30 days (as required by Section 12 (a) of the Act) shall not bar a claim (1) if the employer or his agent in charge of the business in the place where the injury occurred knows of the injury, and the deputy commissioner determines that the employer has not been prejudiced by the absence of written notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason notice could not have been given. The Court of Appeals has held that neither part of the subsection can be invoked to protect the claim of an illiterate longshoreman who, following prevailing custom, gave oral notice shortly after being injured both to his immediate foreman and to the general foreman in charge of all the longshoremen employed on the vessel at the time. This decision should be reviewed because it invalidates the long-standing administrative construction of the Act in a matter of large significance, and runs directly counter to the reading which is generally given throughout the country to comparable provisions of state compensation statutes.

1. The question of the scope to be afforded Section 12 (d) is plainly of immense importance in the administration of the Longshoremen's Act. It need hardly be emphasized that, because of the meagre formal education possessed by a sub-

stantial percentage of the employees covered by the Act, written notice is rarely given to the employer. Further, the average longshoreman does not, and often, as a practical matter, cannot, provide direct oral notice to persons other than his immediate superiors, to whom his personal contact is generally restricted. Accordingly, the narrow construction placed on Section 12 (d) by the Court of Appeals, if allowed to stand, will unquestionably lead to the denial of many meritorious claims for compensation, even if the effect of the decision be confined to the Fifth Circuit with its large array of active port and harbor facilities.[1]

2. The Court of Appeals overturned the express finding of the deputy commissioner that the employer's "agent in charge of the business in the place where the injury occurred" had knowledge of the injury to claimant. In doing so, it took the position that the walking foreman, who concededly had knowledge, could not be classified as such an agent within the meaning of the statute. These conclusions were erroneous and in conflict with many state holdings.

[1] The Bureau of Employees' Compensation has informed us that, since the inception of the Act in 1927, deputy commissioners have universally accepted notice to the employee's official superior, whether that superior was termed a "foreman" or otherwise, as satisfying the requirements of Section 12 (d) (1). And seemingly, until this case, employers and their insurance carriers have not disputed the correctness of that position.

(a) Assuming that it is essential to the deputy commissioner's finding that the walking foreman was the "agent in charge," the uncontroverted testimony before the deputy commissioner shows that the foreman was in charge of all longshoremen aboard the *Southern States* (R. 182, 194). Not only did he direct their work but in addition he had hired claimant and was responsible for paying off the men on behalf of the employer (R. 67, 188, 191). Moreover, at the time of the accident, he and the gang foremen under him were apparently the only representatives of the employer directly supervising the unloading operations. The timekeeper and the gearman (who the Court of Appeals determined was the "agent in charge") were down in the vessel's galley (R. 190) and there is nothing in the record to support, let alone compel, the inference that at that point either of them were exercising actual supervision over the conduct of the enterprise.

The court below failed to set forth the formula it employed in determining that the gearman, and not the walking foreman, was the "agent in charge" within the meaning of the statute.* But we think that the court's conclusion, of itself, demonstrates a serious misconception of the objec-

* The District Court, which arrived at the same conclusion, limited itself to the assertion that the gearman was the "agent in charge of the business of unloading the vessel" in the absence of the employer (R. 229).

tive of the Longshoremen's Act in general and its notice provisions in particular.' The requirement that notice of injury be afforded the employer within a stipulated period is part of the statutory scheme of virtually *every* workmen's compensation act. The legislative purpose is clearly not to place a pitfall along the path of recovery which will serve to deprive the injury employee and his family of the compensation that is an economic necessity in the event of injury occurring in the course of employment. Instead, the notice provisions stem from the belief that in order to obviate the possibility of fictitious claims, as well as to minimize the extent of a bona fide compensable injury, the employer must be allowed timely inquiry into the facts of the alleged accident and given an opportunity to furnish prompt medical attention. Cf. *Matter of Whitmyre* v. *Inter B. M. Corp.*, 267 N. Y. 28, 30, 195 N. E. 530, 540; Horovitz, *Injury and Death under Workmen's Compensations Laws* (1944), p. 247. It is clearly for these reasons—to effectuate the purposes of notice without at the same time placing a harsh burden upon the employee—that the Longshoremen's Act waives the requirement of a written notice in

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[1] The statutory objective is clearly relevant since the question is one of the meaning to be afforded an ambiguous term (*i. e.* "agent in charge") and not, as the Court of Appeals thought (R. 243), whether language should be read into the Act. Cf. *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197.

circumstances where the employer or his agent in charge has actual knowledge of the injury.*

Yet if "agent in charge" does not mean the employer's immediate superior, his foreman—to whom the employee's personal contact with the employer is generally limited—there is a total frustration of the statutory aim of making knowledge an alternative to notice (unless the superior's knowledge is automatically imputed to the employer, see *infra*, pp. 16–18). On the one hand, it is unreasonable to suppose that the employee will be able to comprehend the subtleties of the chain of command sufficiently to enable him personally to discern the individual whom the employer has chosen to regard, perhaps as *post facto* at the compensation hearing, as the "agent in charge." He undoubtedly considers, and we believe quite properly, his foreman as the one person through whom he must deal with the employer. The courts below were undoubtedly influenced by the assertion by the employer and the gearman that the latter was in charge of the unloading operations (R. 179, 193). While such an assertion is entitled to some weight, it is far from conclusive. The primary consideration is who had, insofar as the injured employee could determine, control

* These state workmen's compensation acts which require written notice also, and for the same reason, make knowledge a substitute for notice. Cf. Horovitz, *Injury and Death under Workmen's Compensation Laws* (1944) pp. 252–3. And see pp. 15–16 *infra*.